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No. 97-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF PETITIONER AT&T CORP.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to review the Ninth Circuit's affirmance of a judgment under Oregon state law that awarded respondent Central Office Telephone, Inc. ("COT") $1.1 million in lost profits -- and denied petitioner AT&T's counterclaim to recover unpaid tariffed charges -- on the ground that AT&T had breached alleged provisioning and billing guarantees that concededly were not "covered" by AT&T's tariff. AT&T's opening brief demonstrated that this holding is contrary to almost a century of this Court's decisions and that COT's judgment epitomizes the "rebates," "preferences," and discrimination among similarly situated customers that the filed tariff doctrine is designed to prevent. These points have now been confirmed by the briefs of COT and the Ad Hoc Users Committee, et al. ("Ad Hoc *amici*").

Preliminarily, COT acknowledges that this Court has held that a customer can avoid paying tariffed charges only if it shows that they violate the requirements of §§ 201-203 of the Communications Act, and not by asserting equitable defenses and "common law claims." COT Br. 37 (quoting *Reiter* v. *Cooper*, 507 U.S. 258, 265-66 (1993)). It was thus clearly wrong for the Ninth Circuit to affirm the trial court's denial of AT&T's motions for judgment as a matter of law on its counterclaim.

More fundamentally, as neither COT nor the Ad Hoc *amici* disputes, this Court has squarely held that filed tariff requirements are not limited to rates and that they preempt the very state law claims that COT brought: that it was entitled to expedited service not required by AT&T's tariff. *See*, *e.g.*, *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912); *Davis* v. *Cornwell*, 264 U.S. 560 (1924). It constitutes a "rebate" and "preference" for a carrier, at no extra charge, to provide any "service not covered by the prescribed tariffs." *United States* v. *Wabash R.R.*, 321 U.S. 403, 412-13 (1944).

Moreover, contrary to COT's assertions, AT&T's "marketplace behavior" confirms that COT here imposed obligations on AT&T that COT had not paid for. When AT&T makes the billing and provisioning guarantees that COT alleges -- as AT&T does for customers who are willing to pay for them -- those guarantees are filed in tariffs that contain appropriately higher rates. *See* Appendix to this Reply Brief.

Neither COT nor the Ad Hoc *amici* has discussed *Kirby* and *Davis*, much less attempted to distinguish those decisions. However, they appear to claim (as COT did not below) that those decisions rest on statutory terms that were unique to the Interstate Commerce Act and that they are inconsistent with the terms of the Communications Act and should no longer be followed. COT's principal claims are (1) that § 203 only prohibits untariffed services if those services "affect . . . charges" and (2) that a service does not "affect charges" unless it results in differences in rates.

Both contentions are wrong. Sections 203(c)(2) and 203(c)(3) codified the Interstate Commerce Act's prohibitions against rebates and preferences in order to ensure that this Court's prior decisions would apply to § 203. Further, the narrow construction of "affect . . . charges" that COT proposes is contrary to the terms of § 203(c) and this Court's decisions.

Against this background, it is not surprising that COT's Brief is primarily devoted not to a defense of the Ninth Circuit's holding, but to a series of attempts to defend its judgment on other grounds. Part I of this Reply will demonstrate that those other grounds are not presented by this case and are erroneous. Part II will refute COT's and the Ad Hoc *amici*'s attempts to defend the Ninth Circuit's holding that the filed tariff requirements only apply to rates and rate setting.

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER THE NINTH CIRCUIT CORRECTLY HELD THAT STATUTORY FILED TARIFF REQUIREMENTS APPLY ONLY TO RATES.

COT's Brief is primarily an attempt to avoid the narrow issue before the Court. It seeks to do so both by misstating AT&T's claims and by attempting to disavow the grounds on which COT obtained its judgment. In particular, COT now attempts to recast its lawsuit as raising antitrust or other claims based on COT's status as a competitor or claims that AT&T violated its tariff. These arguments are meritless.

A. This Case Raises No Issue Involving The Rights Of Competitors.

COT's principal argument is that accepting AT&T's position that the filed tariff doctrine forecloses state law claims would "extend the filed rate doctrine to immunize [AT&T] from claims by a competitor for anti-competitive conduct." COT Br. 11. COT did not make this argument below. It is also wrong. As AT&T's Brief demonstrated (pp. 19-20 & n.17, 30-31), resellers and other competitors can claim -- and have claimed -- that they received poor or inferior services in violation of § 201's ban on unreasonable rates and practices, § 202(a)'s ban on unreasonable discrimination, § 203's ban on violation of the carrier's tariff, or (when applicable) federal antitrust laws. By requiring that claims of competitors and other customers be pursued under these federal standards (with all questions subject to the primary jurisdiction of the FCC), the filed tariff doctrine ensures that similarly-situated customers will be treated uniformly and prevents the "rebates" and "preferences" that inevitably arise if customers can maintain state law claims.

Moreover, the filed tariff requirements were enacted to

protect competition by preventing economic discrimination *among* customers who competed with one another: *e.g.*, the railroads' favoritism of large shippers. *See* S. Rep. No. 46, 49th Cong., 1st Sess., pt. I, at 188-90 (1886). Here, COT's judgment gives COT a preference over the 100 other SDN resellers who competed with COT -- and who received the same quality of service -- as well as over commercial SDN customers. Because filed tariff requirements prohibit the provision of rebates and untariffed privileges to any customer, this Court has held that these prohibitions fully apply to freight forwarders and other customers who obtain services from a carrier in order to compete with it. *Lehigh Valley R.R.* v. *United States*, 243 U.S. 444, 445-47 (1917). As the Court has held, "[t]he fact that a person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor." *American Trucking Ass'n, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 407-08 (1967) (and cases cited). Thus, AT&T's claim would not "extend" the filed tariff doctrine.

Ironically, in arguing that the filed tariff doctrine should not apply to competitors' claims under state law, COT relies on a series of federal antitrust decisions that would be inapposite even if this were an antitrust case. COT Br. 11-19. None involved a customer's claims that it was entitled to better regulated service or more favorable rates than required by the tariff. In all events, COT dismissed its federal antitrust claims before trial, and COT's assertions that AT&T attempted to drive resellers out of business (COT Br. 3-9) was not the basis for the jury verdict (and is not supported by the evidence).

B. This Case Presents No Claims Of Violations Of Tariffs Or Contracts Between Carriers.

COT also seeks to defend its judgment by contending that it was not based on the enforcement of extra-tariff promises

at all. Rather, COT now claims that it sought and obtained damages for AT&T's "deliberate failure to provide the services set forth in its tariff." COT Br. 21. This contention is startling. Throughout the proceedings in the trial court, and in the Ninth Circuit, COT successfully opposed AT&T's claim that the only issue in this case should have been whether AT&T had willfully violated its tariff. *See* Petn. 11a.

Moreover, COT took this position because there was no evidence that AT&T had violated the tariff. Indeed, COT's position in the trial court and the Ninth Circuit was that the alleged billing and provisioning guarantees were actionable precisely because they were not "covered" by the tariff.

For example, unlike other AT&T tariffs, AT&T's SDN tariff did not require that orders be installed within any particular number of days, but required only that AT&T "establish" a "due date" after each order was placed, that AT&T make "reasonable efforts" to meet that date, and that AT&T allow the customer to cancel without penalty if the due date was missed by more than 45 days. Here, there is no evidence that AT&T missed a single due date that was established after a COT order was placed, much less that it did so by more than 45 days. Similarly, AT&T's SDN tariff did not then require that calls be billed within any particular number of days, and the fact that it sometimes took "months" for a call to be billed (COT Br. 5) did not violate AT&T's tariff. Yet this was COT's principal billing claim and the sole reason now alleged for COT's termination of SDN services in 1992. ER 1942.

COT also claims that AT&T violated commitments to bill COT's customers on COT's behalf at specific rates during six months in 1990. COT Br. 4, 28 n.10. But AT&T's tariff specifically provided that AT&T would *not* allocate charges among an SDN customer's locations and that doing so was the

customer's (COT's) responsibility. *See* AT&T Br. 32-33.[1] Moreover, as COT has correctly stated to this Court, the FCC's regulations provide that any services in which a common carrier is responsible for billing its customer's customers are not common carrier communication services and may not be provided as part of a tariffed service.[2] Accordingly, AT&T's sole obligation under the SDN tariff was to send bills to the customer (COT) that would enable it to allocate charges among its locations as it saw fit -- which AT&T did by providing bills to SDN customers in one of two different formats. AT&T Br. 7-8. By contrast, the billing services that COT sought could not be provided in exchange for COT's payment of the tariffed rate. Rather, those billing services require separate contracts that impose charges *in addition* to the tariffed long distance service rates -- and there concededly was no such contract here.

COT also seeks to defend its judgment by arguing -- as it did not below -- that § 211 of the Communications Act (47 U.S.C. § 211) supports its state law claims. COT Br. 39-41. But § 211 only allows one carrier to provide service to another carrier pursuant to a written contract that is filed at the FCC. By contrast, even if COT were a "carrier," the only written "contract" was COT's written acknowledgment that its service was governed by AT&T's tariff, and that "contract" was not filed at the FCC.

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[1] For the first time in this case, COT now contends that AT&T violated its tariff by placing COT on the LABO option for which COT did not qualify. COT Br. 4. That is false. AT&T put COT on multilocation billing, but initially prepared bills that had not made the calculations that COT had directed.

[2] *See* COT's Opposition to Petition for Certiorari, p. 6 n.1 (citing *Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1168 (1986); *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, 4 FCC Rcd. 3429 (Chief, Common Carrier Bur. 1989)).

Finally, in all events, the decisive fact is that this case was submitted to the jury on the ground that it could find that AT&T breached a contract and tortiously interfered with COT's business relations with its customers if AT&T willfully violated COT's extra-tariff "understanding" that, for example, orders would be provisioned in 60-90 days.[3] The willful violations of this "duty" could consist of nothing more than AT&T's willful failure to give each COT order priority over the pending and future orders of other customers -- as AT&T conceded it did. That is why the Ninth Circuit recognized that COT's judgment could be upheld only if filed tariff requirements were limited to rates and rate setting and do not preclude state law claims that a carrier had breached oral or implied guarantees of expedited provisioning and billing that are not "covered" by the tariff.

II. THE NINTH CIRCUIT MAJORITY'S HOLDING IS CONTRARY TO THE SETTLED MEANING OF § 203'S TARIFFING REQUIREMENTS.

As AT&T's opening brief demonstrated at length, the Ninth Circuit majority's holding is contrary to a line of this Court's decisions that begins with *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912). *See also Davis* v. *Cornwell*, 264 U.S. 560 (1924). Those decisions hold that untariffed guarantees that service will be provisioned in a particular number of days constitute the "preferences" and unjust "advantages" that are prohibited by the Interstate Commerce Act's ("ICA") counterparts to § 203(c) (and § 202(a)) of the Communications Act. Yet that was COT's provisioning claim and its principal billing claim.

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[3] Contrary to COT's suggestion (Br. 21), both the trial court (ER 2477) and the Ninth Circuit (Petn. 6a) held that COT's tortious interference claim is derivative of COT's breach of contract claim. The claimed intentional interference was AT&T's breach of the alleged extra-tariff guarantees.

Neither COT nor the Ad Hoc *amici* has attempted to distinguish *Kirby* and its progeny or to defend the Ninth Circuit majority's distinction of those cases. However, they argue -- as COT did not below -- that these decisions are inconsistent with the Communications Act and contrary to AT&T's "marketplace behavior." There is no substance to these arguments.

A. *Kirby* And Its Progeny Construed Prohibitions That Were Codified In § 203 In Order To "Preserve" The Prior Interpretations.

COT's and the Ad Hoc *amici*'s main argument appears to be that *Kirby* and its progeny do not apply -- and were not intended to apply -- to § 203 of the Communications Act. They contend that § 203 prohibits untariffed service features only if those features "affect . . . charges," and they contend that a matter does not "affect . . . charges" unless it can produce differences in rate levels: *i.e.*, "that there is a higher rate associated with the presence of a particular term or condition and a lower rate associated with its absence (or vice versa)." COT Br. 33. In this regard, the Ad Hoc *amici* argue Congress used different terms in § 203 than it had in the ICA in order to assure that its prohibition on untariffed practices applied only to these matters. Ad Hoc *amici* Br. 10-11

Preliminarily, prior to the enactment of the Communications Act of 1934, carriers providing interstate telegraph and telephone services were regulated by the Interstate Commerce Commission (ICC) under the provisions of the ICA that applied to transportation. This Court had specifically applied *Kirby* and its progeny to hold that the obligations that telephone and telegraph companies incurred in exchange for the tariffed rates were exclusively federal questions and that the federal tariffing requirements preempted

both state contract and tort claims for failure to provide prompt service.[4]

Congress enacted Title II of the Communications Act of 1934 to transfer to the FCC the same regulatory authority over interstate telephone and telegraph common carriers that the ICC had theretofore exercised.[5] In particular, both the House and Senate Reports stated that many ICA provisions were "copied verbatim," but that other provisions were "simplified and clarified" and "[t]hese variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."[6] The Reports further provided that one reason the Communications Act adopted the ICA provisions was "to preserve the value of court and commission interpretations of that act." House Report, p. 4. For these reasons, and due to the near identity of terms (*see Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)), this Court has held that decisions construing the ICA apply to § 203 of the Communications Act (*MCI Telecom. Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994)), and "across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981); *accord United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) ("settled construction" of ICA applies to other statutes whose "scope and purpose, as well as [] terms [are] closely parallel[]").

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[4] *Western Union Tel. Co.* v. *Boegli*, 251 U.S. 315, 316-17 (1920); *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919).

[5] S. Rep. No. 781, 73d Cong., 2d Sess. 1-2 (1934) ("Senate Report"); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 1-4 (1934) ("House Report").

[6] Senate Report, p. 2; *accord* House Report, p. 4, 5.

These principles apply with special force here. There is no material difference between the language of § 203 of the Communications Act and that of the original § 6(7) of the ICA (which is reproduced in the Appendix to this Reply).[7] And this Court has repeatedly rejected COT's claims in decisions construing the precise terms that are codified in § 203.

1. Section 203(c) Contains The Same Prohibitions That Were Construed In *Kirby* And Its Progeny.

The first error of COT and the Ad Hoc *amici* is their assumption that § 203 only prohibits untariffed "practices . . . affecting . . . charges." In addition to this prohibition, § 203 bars carriers from (1) "collect[ing] . . . different compensation . . . than . . . specified in [its tariff]" (§ 203(c)(1)), (2) "refund[ing] or remit[ting] by any means or device any portion of the charges so specified" (§ 203(c)(2)) (rebates), and (3) "extend[ing] to any person any [untariffed] *privileges* or facilities, in such communication" (§ 203(c)(3)) (emphasis added) (preferences). *See* AT&T Br. 23, 3a-4a.

These latter three prohibitions were "copied" verbatim from § 6(7) of the Interstate Commerce Act.[8] Indeed, § 6(7) did not contain § 203(c)(3)'s additional prohibition against "employ[ing] or enforc[ing] any [untariffed] classifications,

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[7] The Ad Hoc *amici* (Br. 10-11) rely on the fact that the ICA's counterpart to § 203(a) of the Communications Act required carriers to file tariffs that "contain . . . all . . . charges . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such . . . charges, *or the value of the service rendered to the [customer]*," (49 U.S.C. § 6(1) (1934) (emphasis added)), whereas § 203(a) requires tariffs that show all "charges" and the "classifications, practices, and regulations affecting such charges."

[8] Senate Report, p. 4; House Report, p. 5.

regulations, or practices affecting such charges." Thus, in holding that untariffed provisioning guarantees were "preferences," *Kirby*, *Davis*, and their progeny were construing the prohibitions of § 6(7) that were codified verbatim in § 203(c)(2) and § 203(c)(3). In this regard, *Kirby* and *Davis* did not quote, construe, or in any way rely upon any of the language of § 6(1) of the ICA that was not copied verbatim into § 203(a) of the Communications Act (*see* p. 10 n.7, *supra*).

Further, *Kirby* and *Davis* were reaffirmed by this Court in a series of decisions where the only issue was the scope of the prohibition in § 6(7) that is recodified in § 203(c). In particular, the Court held that it was a violation of § 6(7) for a railroad to provide, at no extra charge, "spotting" services that were in addition to point-to-point transportation services defined in the tariff. The Court held a carrier's provision of a "service not covered" in the tariff at no extra charge constituted both a "preference" (in violation of the counterpart to § 203(c)(3)'s ban on untariffed "privilege[s]") and a "rebate" (in violation of the counterpart to § 203(c)(2)). Indeed, the Court held that, whether or not there is discrimination in violation of § 202(a)'s counterpart, "a preference or rebate [that violates § 203(c)'s terms] is the necessary result . . . where the carrier renders or pays for a service not covered by the prescribed tariff." *United States* v. *Wabash R.R.*, 321 U.S. 403, 412-13 (1944) (citing *Davis*, 264 U.S. 560); *accord United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 194-95 (1950) ("a preference necessarily result[s] when a service is rendered 'in excess of that which the carriers are obliged to perform by their tariffs'") (citation omitted). Thus, for example, had AT&T assumed the responsibility for billing COT's customers that COT claimed, it would have been an illegal preference. *See* pp. 5-6, *supra*.

2. COT's Proposed Interpretation Of "Affecting . . . Charges" Is Contrary To The Communications Act's Terms And To This Court's Decisions.

Second, in all events, both the statutory terms and the Court's prior decisions foreclose COT's proposed narrow construction of the prohibitions against untariffed practices "affecting . . . charges." COT argues that the plain meaning of this language is that it covers only features of service that can produce differences in charges between two customers, either because an additional charge is associated with the presence of a feature or because a credit is associated with its absence. COT Br. 33. But whatever the phrase "practices . . . affecting charges" could mean in other contexts, COT's argument is foreclosed by the remaining terms of § 203(c).

Because § 203(c)(1) prohibits any differences in charges between two customers that are not specified in the effective tariff, COT's proposed construction of § 203(c)(3)'s final clause would make surplusage of § 203(c)(1). Further, COT's narrow construction of the terms would establish distinctions that are arbitrary and that defeat the Act's purposes. For example, it would create the very rate discrimination that COT concedes is prohibited, for carriers could orally promise to provide enhanced services and pay the customers their lost profits if the promise were breached.

This Court has rejected COT's proposed construction of "classifications, practices, and regulations affecting . . . charges." In *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 475-76 (1910), this Court held (in construing another provision of the ICA) that these terms applied to practices that did not increase or reduce any customer's payments but that constituted preferences. In *Nantahala Power & Light Co.* v. *Thornburg*,

476 U.S. 953 (1986), the Court held that a power allocation agreement that did not determine any "rates or rates *per se*" was one of the "classifications, practices, and regulations affecting such rates" within the statutory tariffing requirement because the allocated power was valuable and "directly affect[ed]" Nantahala's costs of obtaining power. *Id.* at 966-67. *Compare id.* at 955-61 & 966-67 *with* Federal Power Act, § 205(c), 16 U.S.C. § 824d.

B. AT&T's Positions In This Case Are Supported By Its Marketplace Behavior.

COT and the Ad Hoc *amici* also contend that AT&T's position in this case is inconsistent with positions it previously took before the FCC and with its "marketplace behavior." COT Br. 34-35; Ad Hoc *amici* Br. 16-21. However, rather than supporting COT's claims, AT&T's behavior vividly demonstrates both that COT is here seeking rebates and preferences and that adherence to *Kirby* and its progeny can affect no legitimate interest of any customer.

In suggesting otherwise, COT and the Ad Hoc *amici* point to the fact that AT&T and other long distance carriers have often responded to requests of very large telecommunications users to meet unique requirements by negotiating detailed "contracts" that (1) define the customized services that will be provided, (2) set forth the associated rates, terms, conditions, and privileges, and (3) also deal with the administrative and procedural details of service that, in other contexts, are selected by customers when they submit order forms or are worked out informally. COT and the Ad Hoc *amici* neglect to mention, however, that these customized arrangements are lawful *only if* all the rates, privileges, terms, and conditions that affect rates are also filed in tariffs that are "based upon contracts" and that are generally available to any

other customers willing and able to satisfy the tariffs' terms.[9] Thus, these "contracts" invariably require that tariffs be filed to implement these terms. Accordingly, it is irrelevant that the tables of contents of certain contracts refer to rates, privileges, and terms and conditions that affect rates. These provisions are valid and enforceable only because there is a counterpart to each in the carrier's tariff.

Most pertinently, when AT&T has in fact negotiated the kinds of service and billing guarantees that COT here claims, AT&T files tariff provisions that contain the guarantees and that specify the remedies in the event of a breach. Illustrative examples of these provisions are reproduced in the Appendix to this Reply Brief. For example, "installation guarantees" that orders will be provisioned within specified numbers of days after they are placed are tariffed features of a number of service arrangements that are based on contracts negotiated with large customers as well as other services. *See* Appendix 3a-10a. Similarly, other tariffs contain guarantees that individual calls will be billed within 60, 90, or 120 days (*see id.*, 11a-12a). Finally, although AT&T cannot assume responsibility for billing its customers' customers in a tariffed service, AT&T has entered into separate contracts to provide these unregulated billing services to customers for additional charges. *See* p. 6, *supra*.

In these regards, AT&T has also filed contract tariffs that are specifically designed to meet the needs of resellers and that both provide that service orders will be installed within 10 days (or installation fees will be waived) and that guarantee that 99% of calls will be billed within 90 days in exchange for payment of rates that are higher than those in AT&T's SDN

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[9] *MCI Telecom. Corp.* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990); *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, 5902-03 (1991).

tariff. *See* Appendix 13a. By contrast, there were no such provisions in AT&T's SDN tariff during the periods in question because AT&T was then in no position to guarantee provisioning or billing within particular intervals in exchange for the rates then contained in the tariff.[10] So contrary to COT's claim, this is a case in which COT seeks "to impose an obligation on AT&T to provide premium service (tariffed at a premium rate) at the same rate as a standard service (tariffed at a standard rate)." COT Br. 23.

Against this background, it is ironic that the Ad Hoc *amici* would express concern that acceptance of AT&T's position could jeopardize their service arrangements. The Ad Hoc *amici* do not identify a single instance in which AT&T has negotiated a billing or provisioning guarantee with a customer, but failed to tariff it. Further, in the hypothetical and implausible event that AT&T would participate in an intense competitive bidding, win the business of a large customer by making installation and provisioning guarantees, but omit those guarantees from the implementing tariff, the customer could go to the FCC and obtain relief under § 205 of the Communications Act -- as the original customer did in the one situation where AT&T was alleged to have filed tariff provisions that violated commitments to that customer. *See* Ad Hoc *amici* Br. 23.

To the extent the Ad Hoc *amici* are concerned that AT&T's position could impair other features of their services -- and require tariffs that represent "manuals" for installing complex services -- they are presenting claims that are not raised by this case and that are baseless. As this Court has held,

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[10] AT&T subsequently filed tariff revisions that increased SDN rates, guaranteed billings within 120 days (60 days in one contract tariff), but that continued to make no installation guarantees. Appendix 11a & 12a.

the tariffing obligation applies to a commitment only if it imposes a "*greater* obligation than implied in the tariff" (*Davis*, 264 U.S. at 561) (emphasis added), involves a "special service and higher responsibility" for which a carrier "might clearly exact a higher rate" (*Kirby*, 225 U.S. at 165), confers an "*advantage* . . . which affects the value of the service to the shipper and its cost to the carrier" (*id.*) (emphasis added), or constitutes an extra service beyond those that the agency has found to have been offered by the tariff. *Wabash R.R.*, 321 U.S. at 410. By contrast, as AT&T maintained in the FCC proceedings cited by the Ad Hoc *amici*, the tariffing obligation does not apply to administrative, procedural, or factual details of the provision of service to particular customers that are fairly encompassed within the definition of the tariffed service. Carriers' nontariffed commitments or practices on these subjects do not impose "greater obligations" on the carrier, but merely provide for the provision of the tariffed service on the terms that the customer has ordered it and are enforceable as a matter of federal law under § 203 and other provisions of the Act.

And the Court has squarely rejected any argument that commitments on these subjects are matters of state law. Although *Kirby*, *Davis*, and their progeny held that the alleged guarantees that service would be installed or billed within a particular number of days are matters that must be tariffed to be valid, the Court has otherwise held that the scope of carriers' obligations under their tariffs is a matter that is committed to the primary jurisdiction and discretion of the federal regulatory agency and that is to be uniformly determined as a matter of federal law.[11] Specifically, the Court has held that the agency

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[11] *See United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-68 (1956) (questions of the obligations a carrier incurs in exchange for payment of tariffed rate is a matter of "policy which ought to be considered by the (continued...)

determines whether a particular service feature is within the scope of the tariffed service or, conversely, whether it is an "extra" service that constitutes a preference or a rebate because it has been provided at no additional charge.[12]

C. *Kirby* And Its Progeny Are Not Contrary To The Savings Clause, The Alleged Intentional Misconduct Exception, Or § 10 Of The Communications Act.

COT also makes a series of arguments to the effect that the decisions in *Kirby*, *Davis*, and their progeny were erroneous or should no longer be followed.

Savings Clause. First, COT argues that its state law claims were intended to be preserved by the savings clause of 47 U.S.C. § 414 and the cognate provision of the ICA from which § 414 was copied. COT Br. 24-25. But this argument is erroneous, whether or not it was doctrinally correct for this Court previously to hold that the corollaries to §§ 201 to 205 of the Communications Act are an "occupation of the field by Congress which excluded state action." *Postal Tel. Co.*, 251 U.S. at 31; *see* COT Br. 24. In all events, it has been settled since *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), that the terms of § 414 do not "save" state law claims

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[11](...continued)
Commission in the interests of a uniform and expert administration of the regulatory scheme," for "[c]ourts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors, and the extent to which they are present or absent in the particular case, is tantamount to engaging in judicial guesswork").

[12] *See, e.g., United States Smelting*, 339 U.S. at 193 (where tariffed service "begins and ends" is committed to agency's discretion).

that would create actual "conflicts" with federal law by requiring what § 203(c) prohibits. As the Court held, the statute cannot be construed to "destroy itself." *Id.* at 446. *See also Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507-08 (1913). The principle is here controlling, for COT's judgment, like those at issue in *Kirby*, *Davis*, and their progeny, constitutes the "preferences" and "rebates" that § 203(c) prohibits.[13]

Intentional Torts And Willful Misconduct. COT next argues that state law claims for intentional misconduct are both outside the filed tariff doctrine and authorized by the provision of AT&T's tariff that limits the amount of AT&T's liability only for nonwillful violations of the tariff and the Communications Act. Here, there was no violation of AT&T's tariff, either willful or nonwillful. *See* pp. 5-6, *supra*. Further, COT concedes, as it must, that this Court and courts of appeals have repeatedly held that statutory filed tariff requirements preempt any claims that it was "intentional" or "willful" misconduct for a carrier to collect a filed rate and to refrain from extending the rebates and preferences that the Act prohibits. *See Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94 (1915); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126-28 (1990) (collecting cases); COT Br. 35-36.

Nor is there any basis in the Communications Act, this Court's decisions, or common sense for COT's contention that these holdings should now be limited to attempts to enforce discrimination in charges. It would produce the same discrimination if carriers promised a customer superior service

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[13] COT's reliance (Br. 24-25) on *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) is misplaced, for it presented no such conflict. There was no filed tariff claim in *Nader*, and the common law damages action was authorized by the agency's regulations that defined the tariffed service. *Id.* at 306-07.

and paid it lost profits if the promise were willfully breached -- as it would be whenever, as here, a carrier deliberately failed to give that customer's orders priority over all other customers. That same "willful" breach occurred in *Kirby* and *Davis*.

Section 10 of the Communications Act. Finally, COT and the Ad Hoc *amici* rely on the recent enactment (in the Telecommunications Act of 1996) of § 10 of the Communications Act. 47 U.S.C. § 160. Section 10 authorizes the FCC prospectively to "forbear" from enforcing "any provision of [the Communications Act]" (including, but not limited to, § 203) for a "telecommunications carrier or a telecommunications service" if the FCC finds that enforcing the provision is not necessary to ensure that charges and practices affecting charges are just, reasonable, and nondiscriminatory and to protect consumers and the public interest. COT and the Ad Hoc *amici* claim that this enactment represents a "policy shift" that establishes that tariff filing requirements are no longer the "heart" of the Act, and retroactively repudiates the holdings of *Kirby* and its progeny.

These contentions would be baseless even if § 10 only applied to § 203, which it does not. The enactment of § 10 has no effect on the settled interpretations of § 203's tariffing requirements to any service to which § 203 applies. To the contrary, this Court has held that these interpretations establish the plain meaning of § 203's terms (*Maislin*, 497 U.S. at 130-31) and that the enactment of legislation authorizing exemptions from these requirements for some carriers or services is, if anything, congressional ratification of the interpretations for all the other carriers or services to which the tariffing requirements continue to apply. *Id.* at 133-36. Under the Telecommunications Act of 1996, the terms and settled interpretation of § 203 (and of each other provision of the Communications Act) will thus prospectively govern a carrier's

services unless and until the FCC has eliminated the requirement in a valid and effective order that establishes a new method of defining *that* carrier's duties to its customers -- as the FCC has yet to do even for those services of nondominant carriers that it believes should be detariffed. In this regard, because the Communications Act has prospectively authorized only those exceptions to § 203's requirements that the FCC validly establishes under § 10's standards, it forecloses any claim that Congress was authorizing courts to create additional exceptions by overruling settled law or committing the question of a carrier's obligations to judges and juries applying the different laws of 50 states.

In all events, the 1996 enactment of § 10 cannot retroactively alter the meaning of § 203 for the carriers who were obligated to comply with it in the past. Even if the 1996 enactment of § 10 could establish that § 203's requirements were not previously the "heart" of the Act -- as it could not -- AT&T and other carriers were, in 1990, still prohibited from extending COT and other customers the rebates and preferences that COT claims, and these carriers could then incur the additional obligations that COT seeks only by tariffing them.

Moreover, between 1989 and 1992, the FCC believed (erroneously) that it had the authority that § 10 has now conferred. But at that time, the FCC had found that AT&T was a "dominant carrier" for which compliance with § 203 was essential to prevent discrimination among similarly situated customers. So even if § 10 had been in effect between 1989 and 1992, AT&T would have been fully subject to § 203's duties.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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APPENDIX TO PETITIONER'S REPLY BRIEF

Interstate Commerce Act, 49 U.S.C. § § 6(1) & 6(7) 1a

Examples of AT&T's Tariffed Provisioning Guarantees . . 3a

Examples of AT&T's Tariffed Billing Guarantees 11a

Excerpts from AT&T Contract Tariff Designed for Resellers 13a

TITLE 49 - TRANSPORTATION

CHAPTER 1: INTERSTATE COMMERCE ACT

SEC. 6(1). [49 U.S.C. § 6(1)] Schedules and statements of rates, etc., joint rail and water transportation. -- (1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The

provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

SEC. 6(7). [49 U.S.C. § 6(7)] Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

EXAMPLES OF AT&T'S TARIFFED PROVISIONING GUARANTEES

AT&T CONTRACT TARIFF F.C.C. NO. 6612, § 5.1.3.C.

No-Miss Installation Guarantee - A No-Miss Installation Guarantee applies to the Office Connection when ordered for use with AT&T MEGACOM 800 Service. If AT&T misses an installation due date for (1) the Office Connection used in conjunction with AT&T MEGACOM 800 Service; or (2) access ordered from AT&T's Tariff F.C.C. No. 11 for use with AT&T MEGACOM 800 Service; or (3) AT&T MEGACOM 800 Service, AT&T will, at the Customer's option: (1) waive the Office Connection installation charge ordered by the Customer for use with the AT&T MEGACOM 800 Service, or (2) route the Customer's AT&T MEGACOM 800 calls to an AT&T announcement, at no charge, until the service ordered is available; or (3) provide an alternate temporary AT&T 800 READYLINE until the service ordered is available and waive the nonrecurring, recurring, and usage charges for the alternate temporary AT&T READYLINE provided; or (4) route the calls to one of the following to which the Customer currently subscribes: AT&T 800 Service-Domestic, AT&T 800 READYLINE, AT&T 800 Plan E, AT&T 800 Plan K, AT&T MEGACOM 800 Service or AT&T Plus Services until the service ordered is available. A daily credit will be applied to the bill for the alternate AT&T 800 Service for each day the installation of the new service is delayed beyond the installation due date. The amount of the daily credit will be based on the average daily usage charges for the first full month of the new service.

This guarantee does not apply if service installation delay is caused by the Customer beyond the standard installation interval

or as a result of the conditions set forth in AT&T Tariff F.C.C. No. 9. The regulations in AT&T Tariff F.C.C. No. 9 apply to the services subject to this guarantee.

AT&T CONTRACT TARIFF F.C.C. NO. 6653, § 6.E.1.a.

Installation Guarantee - AT&T guarantees that it will complete the initial installations of service components under this COA within 90 days of the COA order date. This Installation Guarantee applies only to installations at Customer Premises that: 1) are within the contiguous 48 states and 2) AT&T was not the provider of telecommunications service at such premises in the 120 days prior to the COA order date under this COA. The customer must order service components included under this Installation Guarantee within 15 days after the customer places its order for service under this COA and the requested due date for initial installation of all service components covered under this Installation Guarantee must be within 90 days of the COA order date. This Installation Guarantee will not apply to failures or delays to meet installation due dates due to causes attributed to the Customer.

In the event that AT&T fails to complete the initial installation at a Customer Premise included under this Installation Guarantee the following credit(s) will apply. The credit(s) will be an amount equal to $10,000 for each Customer Premises where Dedicated Access is provided and $500 for each Customer Premises where Switched Access is provided. The maximum Installation Guarantee credit shall not exceed $500,000 during the COA Term and is in lieu of any other installation credits or installation guarantees as specified in AT&T Tariff F.C.C. No. 1, as amended from time to time.

AT&T CONTRACT TARIFF F.C.C. NO. 7001, § 6.E.1.

Installation Guarantee - AT&T guarantees that it will complete the initial installations of the AT&T Terrestrial 1,544 Mbps Local Channel Services provided under this Contract Tariff within 120 days of the Contract Tariff order date. This Installation Guarantee applies only to installations at Customer Premises that: 1) are within the contiguous 48 states. The customer must order the AT&T Terrestrial 1.544 Mbps Local Channel Services included under this Installation Guarantee within 15 days after the Customer places its order for service under this Contract Tariff and the requested due date for initial installation of all service components covered under this Installation Guarantee must be within 90 days of the Contract Tariff order date. This Installation Guarantee will not apply to failures or delays to meet installation due dates due to causes attributed to the Customer.

In the event that AT&T fails to complete the initial installation at a Customer Premise included under this Installation Guarantee, the Customer may discontinue this Contract Tariff without liability by notifying AT&T in writing at least 30 days prior to the date of discontinuance and provided the Customer has not discontinued another Contract Tariff Term Plan, AT&T Flex Plan or AT&T Service with a revenue, volume or term commitment without liability in conjunction with its order for this Contract Tariff. This Installation Guarantee is in lieu of any other installation guarantees as specified in AT&T Tariff F.C.C. No. 11, as amended from time to time.

AT&T TARIFF F.C.C. NO. 2, § 2.5.10.F.

No-Miss Installation Guarantee - A No-Miss Installation Guarantee applies to AT&T 800 Service-Domestic, AT&T

Advanced 800 Service, AT&T 800 Plan K, AT&T 800 Plan E, AT&T 800 READYLINE AT&T MEGACOM 800 Service, AT&T 800 Gold Service-Dedicated, AT&T 800 Gold Service-Switched and AT&T 800 Gold Service-Nodal. For AT&T 800 Service-Domestic, AT&T Advanced 800 Service, AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 READYLINE, AT&T 800 Gold Service-Dedicated and AT&T 800 Gold Service-Switched, if AT&T misses an installation due date, AT&T will, at the Customer's option: (1) waive the installation charges for AT&T Advanced 800 Service and the following options ordered in connection with new service: Access Line Extension (Rate-Extension Same Rate Center Area as the Access Line), Four-Wire Terminating Arrangement, Four-Wire Improved Voice Transmission Performance, Dialed Number Identification Service, Non-hunting Number Arrangement, Uniform Call Distribution, Make Busy Arrangement and 800 Telephone Number Changes (Per Telephone Number Added to or Deleted from a routing arrangement); or (2) route the Customer's AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 Service-Domestic, AT&T 800 READYLINE, AT&T 800 Gold Service-Dedicated or AT&T 800 Gold Service-Switched calls at no charge to an AT&T announcement until the service ordered is available; or (3) provide an alternate temporary AT&T 800 READYLINE until the service ordered is available and waive the nonrecurring, recurring, and usage charges for the alternate temporary AT&T 800 READYLINE provided. If the Customer also ordered AT&T Advanced 800 Service to be used with the service ordered, the Customer will be responsible for paying all appropriate AT&T Advanced 800 Service charges incurred; or (4) route the calls to one of the following to which the Customer currently subscribes: AT&T 800 Service-Domestic, AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 READYLINE, AT&T MEGACOM 800 Service, AT&T 800 Gold Service-Dedicated, AT&T 800 Gold Service-Switched or AT&T 800 Gold Service-Nodal until the service ordered is

available. A daily credit will be applied to the bill for the alternate AT&T 800 Service for each day the installation of the new service is delayed beyond the installation due date. The amount of the daily credit will be based on the average daily usage charges for the first full month of the new service.

For AT&T MEGACOM 800 Service and AT&T 800 Gold Service-Nodal, if AT&T misses an installation due date or (1) AT&T MEGACOM 800 Service AT&T 800 Gold Service-Nodal or (2) access ordered from AT&T's Tariff F.C.C. No. 9 and/or AT&T's Tariff F.C.C. No. 11 for use with AT&T MEGACOM 800 Service and AT&T 800 Gold Service-Nodal, AST&T will, at the Customer's option: (1) waive the installation charges for the AT&T 800 Service ordered, including installation charges for AT&T Advanced 800 Service ordered in connection with the new service ordered, or (2) route the Customer's AT&T MEGACOM 800 Service or AT&T 800 Gold Service-Nodal calls at no charge to an AT&T announcement until the service ordered is available, or (3) provide an alternate temporary AT&T 000 READYLINE until the service ordered is available and waive the nonrecurring, and usage charges fro the alternate temporary AT&T 800 READYLINE provided. If the Customer also ordered AT&T Advanced 800 READYLINE provided. If the Customer also ordered AT&T Advanced 800 Service to be used with the service ordered, the Customer will be responsible or paying all appropriate AT&T Advanced 800 Service charges incurred; or (4) route the calls to one of the following to which the Customer currently subscribes: AT&T 800 Service-Domestic, AT&T 800 Plan E, AT&T 800 Plan K, AT&T 800 READYLINE, AT&T MEGACOM 800 Service, AT&T 800 Gold Service-Dedicated, AT&T 800 Gold Service-Switched or AT&T 800 Gold Service-Nodal until the service ordered is available. A daily credit will be applied to the bill for the alternate AT&T 800 Service for each day the installation of the

new service is delayed beyond the installation due date. The amount of the daily credit will be based on the average daily usage charges for the first full month of the new service.

An AT&T 800 Gold Service Customer, has the option, if AT&T is unable to provide the requested service within the Customer's requested interval, of having AT&T 800 Service-Switched installed temporarily until the originally requested service is provided. The Customer only pays usage charges associated with the originally requested service until the originally requested service is provided.

This guarantee does not apply if service installation delay is caused by the Customer beyond the installation interval or as a result of the conditions set forth in Section 2.3.1.G. preceding. The regulations in Section 2.5.10 preceding apply to the services subject to this guarantee.

AT&T TARIFF F.C.C. NO. 12, § 7.2.13.C.

Installation Guarantee - An Installation Guarantee applies to Ports associated with Port Access Telephone Numbers (PATNs) and to service associated with Customer-Specified Non-Port Telephone Numbers (CSNPTNs) subject to the limitation of liability in Section 7.2.8. preceding. High Volume or Promotional Port Access Telephone Numbers are not part of this Installation Guarantee. Except for other remedies expressly set forth in these regulations or in a Customer's VTNS option, the following provisions are in lieu of any other claims. If AT&T misses either the Due Date(s) for the initial quantities, or the Due Date(s) for additions, of Ports associated with PATNs or for CSNPTNs, or in the instance of Measured Ports associated with PATNs, the access provided via access components in the Customer's VTNS Option in Tariff F.C.C.

No. 12 or the access associated with VTNS which is furnished from Tariff F.C.C. Nos. 9 and/or 11, then AT&T will, at the Customer's option:

(1) Provide a one-time credit against the Customer's bill in the amount of $100.00 for each affected Measured Port, Rate Option 1 Measured Remote Port, Rate Option 2 Measured Remote Port or CSNPTN, or

(2) route the Customer's calls at no charge to an AT&T announcement until the service ordered is available, or

(3) route the Customer's calls to a Port with a PATN or a CSNPTN which the Customer already has in service until the service ordered is available. A daily credit will apply to the Customer's bill for the alternate Port with a PATN or the CSNPTN for each day the installation f the service ordered is delayed beyond the due date. The amount of the daily credit for alternate Ports with PATNS or the CSNPTNs will be determined by calculating the average daily measured charges on the delayed PATN or CSNPTN during its first full month of service. This credit will be applied in one lump sum once the service ordered becomes available, or

(4) provide an alternate temporary CSNPTN until the service ordered is available. Nonrecurring charges for the alternate temporary CSNPTN, and any usage or other recurring charges will not apply to the provision of the alternate temporary CSNPTN.

This Installation Guarantee does not apply if the service installation delay is caused by the Customer or as a result of the conditions set forth in Section 7.2.8.7. preceding.

AT&T TARIFF F.C.C. NO. 12, § 7.183.1

SCI [Substantially Complete Installation of the entire customized network] must be within three months of the Customer's initial order of Option 181. If SCI is delayed by AT&T, the Customer may cancel its initial order for VTNS without cancellation charges. . . .

EXAMPLES OF AT&T'S TARIFFED BILLING GUARANTEES

AT&T CONTRACT TARIFF F.C.C. NO. 4675, § 6.C.1.2.

SDN Billing Guarantee - The SDN Billing Guarantee will apply to all SDN (1+) direct dialed; 0+ (Calling Card) direct dialed and operator-assisted; and NRA calls. AT&T will bill these calls within 60 days from the Customer's AT&T bill date.

AT&T CONTRACT TARIFF F.C.C. NO. 5548, § 6.E.

Billing Guarantee - AT&T shall bill the Customer for all Services Provided under this Contract Tariff within 90 days after the date the relevant call is placed, the relevant Service is provided, or the applicable charge has accrued. Subject to the exceptions specified below, AT&T will not charge the Customer for services not billed within the 90-days period. The following calling services provided by AT&T under this Contract Tariff are not, however, included in this guarantee: 0+ Calling Card Usage; calls using Rate Schedule K, as specified in AT&T Tariff F.C.C. No. 1, Section 6.4.3.C.7.(a); foreign originated usage; and the rebilling of calls that were previously billed but not paid. Additionally, this guarantee shall not apply to charges billed after 90 days due to the following causes beyond AT&T's control: acts of God, acts of a public enemy, mandatory government action, natural disaster or labor disputes.

[Also appears in AT&T Contract Tariff F.C.C. No. 6816, § 6.E]

AT&T TARIFF F.C.C. NO. 1, § 6.4.2.D.

SDN Billing Guarantee - AT&T guarantees that it will bill Customers for all SDN calls that are subject to the SDN Billing Guarantee within 120 days after the date the call is placed. The billing date is the date on the Customer's regular monthly SDN bill. For example, a call placed on June 12, 1993 is guaranteed to appear on a Customer's bill dated no later than October 10, 1993. Calls subject to the SDN Billing Guarantee are SDN direct dialed (1+) calls rated under any SDN rate schedule (except Schedule F) including Global SDN calls and Network Remote Access calls. The guarantee does not apply to rebilling of calls that were previously billed but not paid for.

AT&T CONTRACT TARIFF F.C.C. NO. 680, § 6.E.1.

DNS Billing Guarantee - AT&T guarantees that it will bill Customers for 99% of DNS calls (excluding DNS Card Calls) within 90 days after the date the call is placed. The billing date is the date on the Customer's regular monthly DNS bill. The guarantee does not apply to rebilling of calls that were previously billed but not paid for.

[Also appears in AT&T Contract Tariff F.C.C. No. 600, § 6.E.2; AT&T Contract Tariff F.C.C. No. 915, § 5.E; AT&T Contract Tariff F.C.C. No. 930, §6.G; AT&T Contract Tariff F.C.C. No. 969, § 6.F; AT&T Contract Tariff F.C.C. No. 1036, § 6.F; AT&T Contract Tariff F.C.C. No. 1756, § 6.D; AT&T Contract Tariff F.C.C. No. 1495, § 6.E; AT&T Contract Tariff F.C.C. No. 2507, §6.E.1; AT&T Contract Tariff F.C.C. No. 5807, §6.E.3; AT&T Contract Tariff F.C.C. No. 6011, § 6.E.3]

EXCERPTS FROM AT&T CONTRACT TARIFF DESIGNED FOR RESELLERS

AT&T CONTRACT TARIFF F.C.C. NO. 1036, §§ 6.E.5 & 6.E.6.F.

DNS Provisioning Credit - AT&T will use its best efforts to provision each of the first one thousand (1,000) locations which a Customer orders each month within 10 business days after receipt of a Customer's order. If, in a given month, AT&T fails to provision any of a Customer's first 1,000 DNS locations for which the Customer has placed an order within 10 business days, for all such locations not provisioned, AT&T will waive the installation charge per DNS Location as specified in AT&T Tariff F.C.C. No. 1, as amended from time to time. A Customer will not be eligible for this waiver in any month in which that Customer's reject rate for DNS orders exceeds fifteen percent (15%) or in which the Customer's orders for service are delayed [pursuant to other provisions of the tariff].

* * * * *

DNS Billing Guarantee - AT&T guarantees that it will bill Customers for 99% of DNS calls (excluding DNS Card Calls) within 90 days after the date the call is placed. The billing date is the date on the Customer's regular monthly DNS bill. The guarantee does not apply to rebilling of calls that were previously billed but not paid for.

[Also appears in AT&T Contract Tariff F.C.C. No. 600, §§ 6.E.2 & 6.E.3; AT&T Contract Tariff F.C.C. No. 930, §§ 6.G. & 6. I]